

1 AN ACT concerning trusts.

2 Be it enacted by the People of the State of Illinois,
3 represented in the General Assembly:

4 Section 5. The Trusts and Trustees Act is amended by
5 changing Section 5.3 as follows:

6 (760 ILCS 5/5.3)

7 Sec. 5.3. Total return trusts.

8 (a) Conversion by trustee. A trustee may convert a trust
9 to a total return trust as described in this Section if all
10 of the following apply:

11 (1) The trust describes the amount that may or must
12 be distributed to a beneficiary by referring to the
13 trust's income, and the trustee determines that
14 conversion to a total return trust will enable the
15 trustee to better carry out the purposes of the trust and
16 the conversion is in the best interests of the
17 beneficiaries;

18 (2) conversion to a total return trust means the
19 trustee will invest and manage trust assets seeking a
20 total return without regard to whether that return is
21 from income or appreciation of principal, and will make
22 distributions in accordance with this Section (such a
23 trust is called a "total return trust" in this Section);

24 (3) the trustee sends a written notice, which must
25 meet the requirements of subsection (a-5), of the
26 trustee's decision to convert the trust to a total return
27 trust, specifying a prospective effective date for the
28 conversion and including a copy of this Section, to the
29 following beneficiaries, determined as of the date the
30 notice is sent and assuming nonexercise of all powers of
31 appointment:

1 (A) all of the legally competent beneficiaries
2 who are currently receiving or eligible to receive
3 income from the trust; and

4 (B) all of the legally competent beneficiaries
5 who would receive or be eligible to receive a
6 distribution of principal or income if the current
7 interests of beneficiaries currently receiving or
8 eligible to receive income ended (the beneficiaries
9 described in this subparagraph (B) are hereinafter
10 referred to as "notice beneficiaries");

11 (4) there are one or more legally competent income
12 beneficiaries under subdivision (3)(A) of this subsection
13 (a) and one or more legally competent remainder
14 beneficiaries under subdivision (3)(B) of this subsection
15 (a), determined as of the date of sending the notice;

16 (5) a notice no beneficiary fails to object objects
17 to the conversion to a total return trust in a writing
18 delivered to the trustee within 60 days after the notice
19 is sent; and

20 (6) the trustee has signed acknowledgments of
21 receipt confirming that notice was received by each
22 beneficiary required to be sent notice under subdivision
23 (3) of this subsection (a).

24 (a-5) The written notice required under subdivision
25 (a)(3) of this Section must include a statement of how the
26 trustee anticipates the total trust will operate, specify a
27 prospective date, which shall be no later than the beginning
28 of the second year of the trust following the date of notice,
29 and include a copy of this Section.

30 (b) Conversion by agreement. Conversion to a total
31 return trust may be made by agreement between a trustee and
32 all the primary beneficiaries of the trust under the virtual
33 representation provisions of Section 16.1 of this Act if
34 those provisions otherwise apply. The agreement may include

1 any actions a court could properly order under subsection (g)
2 of this Section; however, any distribution percentage
3 determined by the agreement may not be less than 3% nor
4 greater than 5%.

5 (c) Conversion or reconversion by court.

6 (1) The trustee may for any reason elect to
7 petition the court to order conversion to a total return
8 trust, including without limitation the reason that
9 conversion under subsection (a) is unavailable because:

10 (A) a notice beneficiary timely objects to the
11 conversion to a total return trust;

12 (B) there are no legally competent
13 beneficiaries described in subdivision (3)(A) of
14 subsection (a); or

15 (C) there are no legally competent
16 beneficiaries described in subdivision (3)(B) of
17 subsection (a).

18 (2) A beneficiary may request the trustee to
19 convert to a total return trust or adjust the
20 distribution percentage. If the trustee declines or fails
21 to act within 60 days ~~6-months~~ after receiving a written
22 request to do so, the beneficiary may petition the court
23 to order the conversion or adjustment.

24 (3) The trustee may petition the court
25 prospectively to reconvert from a total return trust or
26 adjust the distribution percentage if the trustee
27 determines that the reconversion or adjustment will
28 enable the trustee to better carry out the purposes of
29 the trust. A beneficiary may request the trustee to
30 petition the court prospectively to reconvert from a
31 total return trust or adjust the distribution percentage.
32 If the trustee declines or fails to act within 60 days ~~6~~
33 ~~months~~ after receiving a written request to do so, the
34 beneficiary may petition the court to order the

1 reconversion or adjustment.

2 (4) In a judicial proceeding under this subsection
3 (c), the trustee may, but need not, present the trustee's
4 opinions and reasons (A) for supporting or opposing
5 conversion to (or reconversion from or adjustment of the
6 distribution percentage of) a total return trust,
7 including whether the trustee believes conversion (or
8 reconversion or adjustment of the distribution
9 percentage) would enable the trustee to better carry out
10 the purposes of the trust, and (B) about any other
11 matters relevant to the proposed conversion (or
12 reconversion or adjustment of the distribution
13 percentage). A trustee's actions in accordance with this
14 subsection (c) shall not be deemed improper or
15 inconsistent with the trustee's duty of impartiality
16 unless the court finds from all the evidence that the
17 trustee acted in bad faith. No inference that a trustee
18 previously exercised his or her investment authority or
19 breached his or her judiciary impartiality shall arise
20 from a trustee filing a petition to convert, reconvert,
21 or adjust the distribution percentage.

22 (5) The court shall order conversion to (or
23 reconversion prospectively from or adjustment of the
24 distribution percentage of) a total return trust if the
25 court determines that the conversion (or reconversion or
26 adjustment of the distribution percentage) will enable
27 the trustee to better carry out the purposes of the trust
28 and the conversion (or reconversion or adjustment of the
29 distribution percentage) is in the best interests of the
30 beneficiaries.

31 (6) Notwithstanding any other provision of this
32 Section, a trustee has no duty to inform beneficiaries
33 about the availability of this Section and has no duty to
34 review the trust to determine whether any action should

1 be taken under this Section unless requested to do so in
2 writing by a notice beneficiary described in subdivision
3 (3) of subsection (a).

4 (d) Post conversion. While a trust is a total return
5 trust, all of the following shall apply to the trust:

6 (1) the trustee shall make income distributions in
7 accordance with the governing instrument subject to the
8 provisions of this Section;

9 (2) the term "income" in the governing instrument
10 means an annual amount (the "distribution amount") equal
11 to a percentage (the "distribution percentage") of the
12 net fair market value of the trust's assets, whether the
13 assets are considered income or principal under the
14 Principal and Income Act, averaged over the lesser of:

- 15 (i) the 3 preceding years; or
- 16 (ii) the period during which the trust has
17 been in existence;

18 (3) the distribution percentage for any trust
19 converted to a total return trust by a trustee in
20 accordance with subsection (a) shall be 4%; and

21 (4) the trustee shall pay to a beneficiary (in the
22 case of an underpayment) and shall recover from a
23 beneficiary (in the case of an overpayment) an amount
24 equal to the difference between the amount properly
25 payable and the amount actually paid, plus interest
26 compounded annually at a rate per annum equal to the
27 distribution percentage in the year or years while the
28 underpayment or overpayment exists.

29 (e) Administration. The trustee, in the trustee's
30 discretion, may determine any of the following matters in
31 administering a total return trust as the trustee from time
32 to time determines necessary or helpful for the proper
33 functioning of the trust:

34 (1) the effective date of a conversion to a total

1 return trust;

2 (2) the manner of prorating the distribution amount
3 for a short year in which a beneficiary's interest
4 commences or ceases;

5 (3) whether distributions are made in cash or in
6 kind;

7 (4) the manner of adjusting valuations and
8 calculations of the distribution amount to account for
9 other payments from or contributions to the trust;

10 (5) whether to value the trust's assets annually or
11 more frequently;

12 (6) what valuation dates and how many valuation
13 dates to use;

14 (7) valuation decisions about any asset for which
15 there is no readily available market value, including:

16 (A) how frequently to value such an asset;

17 (B) whether and how often to engage a
18 professional appraiser to value such an asset; and

19 (C) whether to exclude the value of such an
20 asset from the net fair market value of the trust's
21 assets under subdivision (d)(2) for purposes of
22 determining the distribution amount. Any such asset
23 so excluded is referred to as an "excluded asset" in
24 this subsection (e), and the trustee shall
25 distribute any net income received from the excluded
26 asset as provided for in the governing instrument,
27 subject to the following principles:

28 (i) unless the trustee determines there
29 are compelling reasons to the contrary
30 considering all relevant factors including the
31 best interests of the beneficiaries, the
32 trustee shall treat each asset for which there
33 is no readily available market value as an
34 excluded asset;

1 (ii) if tangible personal property or
2 real property is possessed or occupied by a
3 beneficiary, the trustee shall not limit or
4 restrict any right of the beneficiary to use
5 the property in accordance with the governing
6 instrument whether or not the trustee treats
7 the property as an excluded asset;

8 (iii) examples of assets for which there
9 is a readily available market value include:
10 cash and cash equivalents; stocks, bonds, and
11 other securities and instruments for which
12 there is an established market on a stock
13 exchange, in an over-the-counter market, or
14 otherwise; and any other property that can
15 reasonably be expected to be sold within one
16 week of the decision to sell without
17 extraordinary efforts by the seller;

18 (iv) examples of assets for which there
19 is no readily available market value include:
20 stocks, bonds, and other securities and
21 instruments for which there is no established
22 market on a stock exchange, in an
23 over-the-counter market, or otherwise; real
24 property; tangible personal property; and
25 artwork and other collectibles; and

26 (8) any other administrative matters as the trustee
27 determines necessary or helpful for the proper
28 functioning of the total return trust.

29 (f) Allocations.

30 (1) Expenses, taxes, and other charges that would
31 be deducted from income if the trust were not a total
32 return trust shall not be deducted from the distribution
33 amount.

34 (2) Unless otherwise provided by the governing

1 instrument, the trustee shall fund the distribution
2 amount each year from the following sources for that year
3 in the order listed: first from net income (as the term
4 would be determined if the trust were not a total return
5 trust), then from other ordinary income as determined for
6 federal income tax purposes, then from net realized
7 short-term capital gains as determined for federal income
8 tax purposes, then from net realized long-term capital
9 gains as determined for federal income tax purposes, then
10 from trust principal comprised of assets for which there
11 is a readily available market value, and then from other
12 trust principal.

13 (g) Court orders. The court may order any of the
14 following actions in a proceeding brought by a trustee or a
15 beneficiary in accordance with subdivision (c)(1), (c)(2), or
16 (c)(3):

17 (1) select a distribution percentage other than 4%;

18 (2) average the valuation of the trust's net assets
19 over a period other than 3 years;

20 (3) reconvert prospectively from or adjust the
21 distribution percentage of a total return trust;

22 (4) direct the distribution of net income
23 (determined as if the trust were not a total return
24 trust) in excess of the distribution amount as to any or
25 all trust assets if the distribution is necessary to
26 preserve a tax benefit; ~~or~~

27 (5) change or direct any administrative procedure
28 as the court determines necessary or helpful for the
29 proper functioning of the total return trust; ~~or~~

30 (6) order reimbursement of the fees and expenses
31 incurred by a beneficiary if the court grants a petition
32 of the beneficiary or of a trustee and such other relief
33 as a court may find appropriate in the exercise of its
34 equitable powers.

1 Nothing in this subsection (g) limits the equitable
2 powers of the court to grant other relief.

3 (g-5) Considerations. A trustee or a court may consider
4 the following when deciding whether to accept or decline a
5 request to convert, reconvert, or determine a distribution
6 percentage:

7 (1) The nature, purpose, and expected duration of
8 the trust.

9 (2) The intent of the settlor.

10 (3) The identity and circumstances of the
11 beneficiaries.

12 (4) The needs for liquidity, regularity of income,
13 and preservation and appreciation of capital.

14 (5) The assets held in the trust; the extent to
15 which they consist of financial assets, interests in
16 closely held enterprises, tangible and intangible
17 personal property, or real property; the extent to which
18 an asset is used by a beneficiary; and whether an asset
19 was purchased by the trustee or received from the
20 settlor.

21 (6) The net amount allocated to income under
22 Section 3 of the Principal and Income Act and the
23 increase or decrease in the value of the principal
24 assets, which the trustee may estimate as to assets for
25 which market values are not readily available.

26 (7) Whether and to what extent the terms of the
27 trust give the trustee the power to invade principal or
28 accumulate income or prohibit the trustee from invading
29 principal or accumulating income, and the extent to which
30 the trustee has exercised a power from time to time to
31 invade principal or accumulate income.

32 (8) The actual and anticipated effect of economic
33 conditions on principal and income and the effects of
34 inflation and deflation.

1 (9) The anticipated tax consequences of an
2 adjustment.

3 (h) Restrictions. The distribution amount may not be
4 less than the net income of the trust, determined without
5 regard to the provisions of this Section, for either a trust
6 for which an estate tax or a gift tax marital deduction was
7 or may be claimed in whole or in part (but only during the
8 lifetime of the spouse for whom the trust was created), or a
9 trust that was exempt in whole or in part from
10 generation-skipping transfer tax on the effective date of
11 this amendatory Act of the 92nd General Assembly by reason of
12 any effective date or transition rule. Conversion to a total
13 return trust does not affect any provision in the governing
14 instrument:

15 (1) directing or authorizing the trustee to
16 distribute principal;

17 (2) directing or authorizing the trustee to
18 distribute a fixed annuity or a fixed fraction of the
19 value of trust assets;

20 (3) authorizing a beneficiary to withdraw a portion
21 or all of the principal; or

22 (4) in any manner that would diminish an amount
23 permanently set aside for charitable purposes under the
24 governing instrument unless both income and principal are
25 so set aside.

26 (i) Tax limitations. If a particular trustee is a
27 beneficiary of the trust and conversion or failure to convert
28 would enhance or diminish the beneficial interest of the
29 trustee, or if possession or exercise of the conversion power
30 by a particular trustee would alone cause any individual to
31 be treated as owner of a part of the trust for income tax
32 purposes or cause a part of the trust to be included in the
33 gross estate of any individual for estate tax purposes, then
34 that particular trustee may not participate as a trustee in

1 the exercise of the conversion power; however:

2 (1) the trustee may petition the court under
3 subdivision (c)(1) to order conversion in accordance with
4 this Section; and

5 (2) if the trustee has one or more co-trustees to
6 whom this subsection (i) does not apply, the co-trustee
7 or co-trustees may convert the trust to a total return
8 trust in accordance with this Section.

9 (j) Releases. A trustee may irrevocably release the
10 power granted by this Section if the trustee reasonably
11 believes the release is in the best interests of the trust
12 and its beneficiaries. The release may be personal to the
13 releasing trustee or may apply generally to some or all
14 subsequent trustees, and the release may be for any specified
15 period, including a period measured by the life of an
16 individual.

17 (k) Remedies. A trustee who reasonably and in good faith
18 takes or omits to take any action under this Section is not
19 liable to any person interested in the trust. If a trustee
20 reasonably and in good faith takes or omits to take any
21 action under this Section and a person interested in the
22 trust opposes the act or omission, the person's exclusive
23 remedy is to obtain an order of the court directing the
24 trustee to convert the trust to a total return trust, to
25 reconvert from a total return trust, to change the
26 distribution percentage, or to order any administrative
27 procedures the court determines necessary or helpful for the
28 proper functioning of the trust. If a court finds that the
29 trustee did not act reasonably and in good faith, the court
30 may require the trustee to pay an appropriate amount from the
31 trustee's own funds to the trust or the beneficiaries to put
32 the trust or the beneficiaries in the position that it or
33 they would have occupied if the trustee had not so acted. An
34 act or omission by a trustee under this Section is presumed

1 taken or omitted reasonably and in good faith unless it is
2 determined by the court to have been an abuse of discretion.
3 Any claim by any person interested in the trust that an act
4 or omission by a trustee under this Section was an abuse of
5 discretion is barred if not asserted in a proceeding
6 commenced by or on behalf of the person within 2 years after
7 the trustee has sent to the person or the person's personal
8 representative a notice or report in writing sufficiently
9 disclosing facts fundamental to the claim such that the
10 person knew or reasonably should have known of the claim. The
11 preceding sentence shall not apply to a person who was under
12 a legal disability at the time the notice or report was sent
13 and who then had no personal representative. For purposes of
14 this subsection (k), a personal representative refers to a
15 court appointed guardian or conservator of the estate of a
16 person.

17 (1) Application. This Section is available to trusts in
18 existence on the effective date of this amendatory Act of the
19 92nd General Assembly or created after that date. This
20 Section shall be construed as pertaining to the
21 administration of a trust and shall be available to any trust
22 that is administered in Illinois under Illinois law or that
23 is governed by Illinois law with respect to the meaning and
24 effect of its terms unless:

25 (1) the trust is a trust described in Internal
26 Revenue Code Section 170(f)(2)(B), 664(d), 1361(d),
27 2702(a)(3), or 2702(b); or

28 (2) the governing instrument expressly prohibits
29 use of this Section by specific reference to this
30 Section. A provision in the governing instrument in the
31 form: "Neither the provisions of Section 5.3 of the
32 Trusts and Trustees Act nor any corresponding provision
33 of future law may be used in the administration of this
34 trust" or a similar provision demonstrating that intent

1 is sufficient to preclude the use of this Section; or-

2 (3) the trust is a trust with respect to which a
3 trustee currently possesses the power to adjust under
4 Section 4.5 of the Principal and Income Act.

5 (Source: P.A. 92-838, eff. 8-22-02.)

6 Section 10. The Principal and Income Act is amended by
7 adding Sections 4.5 and 4.10 as follows:

8 (760 ILCS 15/4.5 new)

9 Sec. 4.5. Trustee's power to adjust.

10 (a) A trustee may adjust between principal and income to
11 the extent the trustee considers necessary if the trustee
12 invests and manages trust assets as a prudent investor, the
13 terms of the trust describe the amount that may or must be
14 distributed to a beneficiary by referring to the trust's
15 income, and the trustee determines, after applying the rules
16 in subsection (b) of Section 3 of this Act, that the trustee
17 is unable to comply with that subsection (b).

18 (b) In deciding whether and to what extent to exercise
19 the power conferred by subsection (a), a trustee shall
20 consider all factors relevant to the trust and its
21 beneficiaries, including the following factors to the extent
22 that they are relevant:

23 (1) The nature, purpose, and expected duration of
24 the trust.

25 (2) The intent of the settlor.

26 (3) The identity and circumstances of the
27 beneficiaries.

28 (4) The needs for liquidity, regularity of income,
29 and preservation and appreciation of capital.

30 (5) The assets held in the trust; the extent to
31 which they consist of financial assets, interests in
32 closely held enterprises, tangible and intangible

1 personal property, or real property; the extent to which
2 an asset is used by a beneficiary; and whether an asset
3 was purchased by the trustee or received from the
4 settlor.

5 (6) The net amount allocated to income under the
6 other Sections of this Act and the increase or decrease
7 in the value of the principal assets, which the trustee
8 may estimate as to assets for which market values are not
9 readily available.

10 (7) Whether and to what extent the terms of the
11 trust give the trustee the power to invade principal or
12 accumulate income or prohibit the trustee from invading
13 principal or accumulating income, and the extent to which
14 the trustee has exercised a power from time to time to
15 invade principal or accumulate income.

16 (8) The actual and anticipated effect of economic
17 conditions on principal and income and the effects of
18 inflation and deflation.

19 (9) The anticipated tax consequences of an
20 adjustment.

21 (c) A trustee may not make an adjustment:

22 (1) that diminishes the income interest in a trust
23 that requires all of the income to be paid at least
24 annually to a spouse and for which an estate tax or gift
25 tax marital deduction would be allowed, in whole or in
26 part, if the trustee did not have the power to make the
27 adjustment;

28 (2) that reduces the actuarial value of the income
29 interest in a trust to which a person transfers property
30 with the intent to qualify for a gift tax exclusion;

31 (3) that changes the amount payable to a
32 beneficiary as a fixed annuity or a fixed fraction of the
33 value of the trust assets;

34 (4) from any amount that is permanently set aside

1 for charitable purposes under a will or the terms of a
2 trust unless both income and principal are so set aside;

3 (5) if possessing or exercising the power to make
4 an adjustment causes an individual to be treated as the
5 owner of all or part of the trust for income tax
6 purposes, and the individual would not be treated as the
7 owner if the trustee did not possess the power to make an
8 adjustment;

9 (6) if possessing or exercising the power to make
10 an adjustment causes all or part of the trust assets to
11 be included for estate tax purposes in the estate of an
12 individual who has the power to remove a trustee or
13 appoint a trustee, or both, and the assets would not be
14 included in the estate of the individual if the trustee
15 did not possess the power to make an adjustment;

16 (7) if the trustee is a beneficiary of the trust;
17 or

18 (8) if the trustee is not a beneficiary, but the
19 adjustment would benefit the trustee directly or
20 indirectly.

21 (d) If subdivision (c)(5), (c)(6), (c)(7), or (c)(8)
22 applies to a trustee and there is more than one trustee, a
23 co-trustee to whom the provision does not apply may make the
24 adjustment unless the exercise of the power by the remaining
25 trustee or trustees is not permitted by the terms of the
26 trust.

27 (e) A trustee may release the entire power conferred by
28 subsection (a) or may release only the power to adjust from
29 income to principal or the power to adjust from principal to
30 income if the trustee is uncertain about whether possessing
31 or exercising the power will cause a result described in
32 subdivisions (c)(1) through (c)(6) or in subdivision (c)(8)
33 or if the trustee determines that possessing or exercising
34 the power will or may deprive the trust of a tax benefit or

1 impose a tax burden not described in subsection (c). The
2 release may be permanent or for a specified period, including
3 a period measured by the life of an individual.

4 (f) Terms of a trust that limit the power of a trustee
5 to make an adjustment between principal and income do not
6 affect the application of this Section unless it is clear
7 from the terms of the trust that the terms are intended to
8 deny the trustee the power of adjustment conferred by
9 subsection (a).

10 (g) With respect to a trust in existence on January 1,
11 2003:

12 (1) A trustee shall not have the power to adjust
13 under this Section if, within 60 days after the date of
14 the statement required in subsection (h), a super
15 majority of the trust beneficiaries deliver to the
16 trustee a written objection to the application of this
17 Section to the trust. An objection shall be deemed to be
18 delivered to the trustee on the date the objection is
19 mailed to the mailing address listed in the notice
20 provided under subsection (h).

21 (2) An objection under this Section may be executed
22 by a legal representative or natural guardian of a
23 beneficiary without the commencement of any court
24 proceeding or the approval of any court.

25 (3) If an objection is delivered to the trustee,
26 then the trustee may petition the circuit court for an
27 order quashing the objection and vesting in the trustee
28 the power to adjust under this Section. The burden will
29 be on the objecting beneficiaries to prove that the power
30 to adjust would be inequitable, illegal, or otherwise in
31 contravention of the grantor's intent. The court may
32 award costs and attorney's fees relating to the trustee's
33 petition in the same manner as in chancery actions. When
34 costs and attorney's fees are to be paid out of the

1 trust, the court, in its discretion, may direct from
2 which part of the trust they shall be paid.

3 (4) If no timely objection is made or if the
4 trustee is vested with the power to adjust by court
5 order, the trustee may thereafter exercise the power to
6 adjust without providing notice of its intent to do so
7 unless, in vesting the trustee with the power to adjust,
8 the court determines that unusual circumstances require
9 otherwise.

10 (5) If a trustee makes a good faith effort to
11 comply with the notice provisions of subsection (h), but
12 fails to deliver notice to one or more beneficiaries
13 entitled to such notice, neither the validity of the
14 notice required under this subsection nor the trustee's
15 power to adjust under this Section shall be affected
16 until the trustee has actual notice that one or more
17 beneficiaries entitled to notice were not notified. Until
18 the trustee has actual notice of the notice deficiency,
19 the trustee has all of the powers and protections granted
20 a trustee with the power to adjust under this Act. When
21 the trustee has actual notice that one or more
22 beneficiaries entitled to notice under subsection (h)
23 were not notified, the trustee's power to adjust under
24 this Section shall cease until all beneficiaries who are
25 entitled to such notice, including those who were
26 previously provided with such notice, are notified and
27 given the opportunity to object as provided for under
28 this subsection.

29 (6) The objection of a super majority of
30 beneficiaries under this subsection shall be valid for a
31 period of one year after the date of the notice given
32 under subsection (h). Upon expiration of the objection,
33 the trustee may thereafter give a new notice under
34 subsection (h).

1 (7) Nothing in this Section is intended to create
2 or imply a duty of the trustee of a trust existing on
3 January 1, 2003 to seek a power to adjust pursuant to
4 this subsection or to give the notice described in
5 subsection (h) if the trustee does not desire to have a
6 power to adjust under this Section, and no inference of
7 impropriety shall be made as the result of a trustee not
8 seeking a power to adjust pursuant to this subsection.

9 (8) A trust exists on January 1, 2003 if it is not
10 revocable on January 1, 2003. A trust is revocable if it
11 is revocable by the grantor alone or in conjunction with
12 any other person. A trust is not revocable for purposes
13 of this Section if it is revocable by the grantor only
14 with the consent of all persons having a beneficial
15 interest in the property.

16 (h) A trustee of a trust in existence on January 1, 2003
17 that is not prohibited under subsection (c) from exercising
18 the power to adjust shall, any time before initially
19 exercising the power, provide notice to the following
20 beneficiaries:

21 (1) All of the legally competent beneficiaries who
22 are then currently receiving or eligible to receive
23 income from the trust.

24 (2) All of the legally competent beneficiaries who
25 would receive or be eligible to receive a distribution of
26 principal or income if the then-current interests of the
27 beneficiaries then currently receiving or eligible to
28 receive income ended (the beneficiaries described in this
29 paragraph (2) are hereinafter referred to as notice
30 beneficiaries").

31 The notice required under this subsection must include
32 all of the following:

33 (A) The name, telephone number, street address, and
34 mailing address of the trustee and of any individuals who

1 may be contacted for further information.

2 (B) A statement that unless a super majority of the
3 beneficiaries objects to the application of this Section
4 to the trust within 60 days after the date the statement
5 pursuant to this subsection was served, then this Section
6 will apply to the trust; and the trustee will have the
7 power to adjust between income and principal and that
8 such a power may have an effect on the distributions to
9 such beneficiary from the trust.

10 (C) The statement required under paragraph (B) may
11 contain information regarding a trustee's fiduciary
12 obligations with respect to the power to adjust between
13 income and principal under this Section.

14 (i) For purposes of subsections (g) and (h), a "super
15 majority" of the trust beneficiaries means at least
16 two-thirds in interest of the reasonably ascertainable
17 current beneficiaries described in subsection (h).

18 (760 ILCS 15/4.10 new)

19 Sec. 4.10. Judicial control of discretionary power.

20 (a) The court may not order a fiduciary to change a
21 decision to exercise or not to exercise a discretionary power
22 conferred by this Act unless it determines that the decision
23 was an abuse of the fiduciary's discretion. A fiduciary's
24 decision is not an abuse of discretion merely because the
25 court would have exercised the power in a different manner or
26 would not have exercised the power.

27 (b) The decisions to which subsection (a) applies
28 include the following:

29 (1) A decision under Section 4.5 as to whether and
30 to what extent an amount should be transferred from
31 principal to income or from income to principal.

32 (2) A decision regarding the factors that are

1 relevant to the trust and its beneficiaries, the extent
2 to which the factors are relevant, and the weight, if
3 any, to be given to those factors, in deciding whether
4 and to what extent to exercise the discretionary power
5 conferred by Section 4.5.

6 (c) If the court determines that a fiduciary has abused
7 the fiduciary's discretion, the court may place the income
8 and remainder beneficiaries in the positions they would have
9 occupied if the discretion had not been abused, according to
10 the following rules:

11 (1) To the extent that the abuse of discretion has
12 resulted in no distribution to a beneficiary or in a
13 distribution that is too small, the court shall order the
14 fiduciary to distribute from the trust to the beneficiary
15 an amount that the court determines will restore the
16 beneficiary, in whole or in part, to the beneficiary's
17 appropriate position.

18 (2) To the extent that the abuse of discretion has
19 resulted in a distribution to a beneficiary that is too
20 large, the court shall place the beneficiaries, the
21 trust, or both, in whole or in part, in their appropriate
22 positions by ordering the fiduciary to withhold an amount
23 from one or more future distributions to the beneficiary
24 who received the distribution that was too large or
25 ordering that beneficiary to return some or all of the
26 distribution to the trust.

27 (3) To the extent that the court is unable, after
28 applying paragraphs (1) and (2), to place the
29 beneficiaries, the trust, or both, in the positions they
30 would have occupied if the discretion had not been
31 abused, the court may order the fiduciary to pay an
32 appropriate amount from its own funds to one or more of
33 the beneficiaries or the trust or both.

34 (d) Upon petition by the fiduciary, the court having

1 jurisdiction over a trust shall determine whether a proposed
2 exercise or non-exercise by the fiduciary of a discretionary
3 power conferred by this Act will result in an abuse of the
4 fiduciary's discretion. If the petition describes the
5 proposed exercise or non-exercise of the power and contains
6 sufficient information to inform the beneficiaries of the
7 reasons for the proposal, the facts upon which the fiduciary
8 relies, and an explanation of how the income and remainder
9 beneficiaries will be affected by the proposed exercise or
10 non-exercise of the power, a beneficiary who challenges the
11 proposed exercise or non-exercise has the burden of
12 establishing that it will result in an abuse of discretion.